

BEFORE ARBITRATOR TAMOTSU TANAKA

STATE OF HAWAII

In the Matter of the Arbitration Between)	Grievance of
)	
UNITED PUBLIC WORKERS,)	
AFSCME, LOCAL 646, AFL-CIO,)	
Union,)	
)	
and)	
)	
STATE OF HAWAII, DEPARTMENT OF)	
EDUCATION,)	
)	
Employer.)	
_____)	

ARBITRATION DECISION AND AWARD

1. STATEMENT OF THE CASE

This grievance was filed by the United Public Workers, AFSCME, Local 646, AFL-CIO (hereinafter 'Union') on behalf of (hereinafter "Grievant"). Grievant is employed by the State of Hawaii, Department of Education (hereinafter "Employer") at as a full-time Custodian II. By letter dated, the Employer reprimanded Grievant and removed her from temporary assignment to the higher position of Head Custodian or School Custodian III.

The grievance could not be resolved during the grievance process set forth in the Collective Bargaining Agreement between the parties and this arbitration proceeding was conducted. The parties stipulated that there were no issues of arbitrability. The Employer was represented by Maria Fidelino-Cook, Esq. of the Department of the Attorney General, State of Hawaii, and the Union was represented by David Hagino, Esq. After the conclusion of the hearing, both parties submitted simultaneous briefs.

II. STATEMENT OF FACTS

Grievant started working for Employer about six years ago as a substitute employee and worked in various positions: security supervisor, custodian, and classroom cleaner. About four years ago she became a half-time permanent custodian at and became a full-time custodian a year later.

In, Grievant was temporarily assigned to the Head Custodian position because the incumbent Head Custodian,, was on worker's compensation leave and the previous acting Head Custodian,, retired. At the time of the disciplinary action, Grievant was the senior person as Custodian II and the acting Head Custodian.

On, the Principal, issued Grievant an official letter of reprimand for four incidents involving Grievant's "misuse of supervisory position, misuse of school keys, misuse of State of Hawaii property and lying to immediate supervisor." By the same letter, Grievant was notified that she will be removed from her position as the acting Head Custodian effective

The four incidents cited in the official letter of reprimand, which occurred while Grievant was the acting Head Custodian, are as follows: (1) Grievant lied about the whereabouts of one of the school's three weed whackers (herein "Weed Whacker Incident"); (2) Grievant asked a co-employee to make posters for Grievant's granddaughter's party using school supplies and equipment without permission (herein "Poster Plus Incident"); (3) Grievant took two picnic tables and benches, four cafeteria tables, and six lattice panels from the school without permission and used them for personal use (herein "Picnic Tables Incident"); and (4) Grievant lied to her supervisor about the scheduling of a substitute classroom cleaner (herein "..... Incident").

III. ISSUES

1 . Did the Employer have just and proper cause to discipline to the Grievant? If what is official letter of reprimand an the appropriate remedy?

2. Did the Employer violate the CBA when it removed Grievant from her temporary assignment?

IV. RELEVANT CONTRACT PROVISIONS

Section 11. DISCIPLINE.

11.01 Regular employees shall be subject to discipline by the Employer for just and proper cause. When such an employee is disciplined, he and the Union shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. When an employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the employee. In the event the need to impose discipline other than an oral warning or reprimand is immediate, the employee and the Union shall be furnished the reason(s) in writing within 48 hours after the disciplinary action is taken. All written notifications of disciplinary actions involving suspension and discharge shall include the following:

- a. Effective dates of the penalties to be imposed and
- b. Details of the specific reasons.

It is provided, however, that in the case of a discharge, such employee shall be granted an opportunity to respond to the charges prior to the effective date of discharge.

11.02 In the event that an employee is scheduled in advance by the Employer or his representative to meet to answer questions, he shall be informed of the purpose of the meeting. When the subject of the meeting is on a job related incident and the employee reasonably feels that disciplinary action against him may result from such meeting, he may request that a Union representative or steward be present during the meeting.

The employee shall be credited with work time in the event meetings are held during his off-duty hours; provided that the employee's normal work hours may be adjusted so as to accommodate the time spent in such meetings and such adjustments shall not be construed to be working a split shift.

11.03 When the Employer takes action under this section which either the employee or the Union believes is improper or unjustified, he or it shall have the right to process a grievance through the grievance procedure as provided under Section 15. GRIEVANCE PROCEDURE, hereunder.

Section 11A. LEAVE PENDING INVESTIGATION OF CHARGES.

11A.01 Whenever an investigation of charges against an employee is pending and the employee's presence at the work site is deemed by the Employer or designee to be detrimental to the proper conduct of the investigation or the operations of the workplace, the Employer or designee may place the employee on a leave of absence without pay pending investigation subject to the following:

- a. The employee, who is placed on a leave of absence without pay pending investigation, and the Union shall be given written notice within forty-eight (48) hours after such action is taken. The written notice shall indicate the reason(s) for taking the employee off the job, available facts supporting the reason(s), and the effective date of the leave of absence without pay pending investigation.
- b. The period of the leave of absence without pay pending investigation shall be for such length of time as may be necessary to conclude the investigation, but not exceeding thirty (30) days. In the event the investigation exceeds thirty (30) days, the Employer or designee may exercise its options provided in subsection 11A.02.
- c. Upon conclusion of the investigation, the employee who has been placed on leave of absence without pay pending investigation shall be reinstated without loss of pay and all rights and benefits will be restored as though such employee had not been on such leave if the

employee is cleared during the investigation or the charge is dropped or not substantiated.

d. Notwithstanding the time limitations as provided in Section 11. DISCIPLINE to the contrary:

1. In the event a suspension is warranted, the Employer or designee may consider any portion of the period of the leave of absence without pay pending investigation towards fulfilling, in whole or in part, the disciplinary action considered appropriate by the Employer or designee may consider any portion of the period of the leave of absence designee. The employee shall be reinstated without loss of pay and restored with all rights and benefits for any portion of the period of the leave of absence without pay pending investigation which has not been considered towards fulfilling the disciplinary action.
2. In the event a dismissal is warranted, the employee shall not be granted any back pay or restored with any rights and benefits for the period of the leave of absence without pay pending investigation.

11A.02 Notwithstanding the foregoing to the contrary, whenever an investigation of charges against an employee is pending, the Employer or designee shall have the discretion to (a) retain the employee in active duty status, (b) place the employee on leave of absence with pay, (c) return the employee to active duty status from leave without pay pending investigation, or (d) reassign the employee to another work unit or area and in the same or different capacity. The action shall be for such length of time as may be necessary to conclude the investigation.

* * * *

16.03 A temporary assignment is the assignment by a competent authority and the assumption, without a formal change in position assignment, of all or a major portion of the significant duties and responsibilities of another position due to:

- a. The incumbent of the position not being available to perform the duties of his position, including the situation where the incumbent of the position who is required to operate two or more pieces of motorized equipment which are essential to his classification is available, but competent authority determines that there is a need for the incumbent and another employee to operate the two or more pieces of motorized equipment at the same time,

* * * *

16.04 Temporary assignment shall be made as follows:

- a. The qualified employee on duty in the class immediately below the class of the temporary assignment in the same series with the

greatest Baseyard, Workplace or Institutional Workplace seniority shall perform the temporary assignment unless excused from such assignment for valid reasons. If there is no qualified employee on duty in the next lower class in the same series, the above procedure will be continued within the same series until the series has been exhausted. When an employee has satisfactorily performed temporary assignments to a position in another classification and he continues to possess the capabilities of performing such assignments, he shall be presumed to be qualified for future temporary assignments to such position; however, when a new or different qualification is required by law for such position, this presumption shall not apply. Also, when an employee is no longer capable of performing temporary assignments to a position in another classification due to changes in operating techniques resulting from the acquisition of new or different types of replacement equipment or machinery, Section 16.04 c. shall be applicable. It is provided that whenever an employee performs temporary assignments while serving on a new or initial probationary period, the employee's new or initial probationary period may, at the discretion of the Employer, be adjusted by the same length of time as the total duration of such temporary assignments performed while on probation.

* * * *

- c. If qualified employees are not available for temporary assignment within the bargaining unit and the need for such temporary assignment is recurrent, the Employer shall, within the resources available, endeavor to provide training to insure that qualified employees become available.

* * * *

- e. The duration of a temporary assignment to a vacant position shall not exceed a total of 180 working days per calendar year. However, the Employer may grant temporary assignment beyond the initial 180 working day period.
- f. Temporary assignment seniority lists shall be prepared by the Employer in consultation with the Union and a copy submitted to the Union and posted in each Baseyard, Workplace or Institutional Workplace. . . .

V. DISCUSSION

A. Whether there is just and proper cause to discipline the Grievant?

By letter dated, Grievant was reprimanded for her "misuse of supervisory position, misuse of school keys, misuse of State of Hawaii property and lying to immediate supervisor." The reprimand was based upon the following four incidents which were described in the letter of reprimand.

1. Weed Whacker Incident.

Grievant was asked on by her principal,, whereabouts of the school's three weed whackers. Grievant responded that two of the weed whackers were in the storage room and the third was being repaired. On the then head custodian, who was on medical leave, admitted to the vice-principal,, that he had borrowed one weed whacker and was waiting for Grievant to pick it up at his home.

On, and at the arbitration hearing, Grievant admitted that she told a lie about the weed whackers. Her explanation, at the arbitration hearing, was that she was loyal to her boss who had borrowed the machine. Previously during the grievance process, Grievant said she lied because she was busy and wanted to get off her back.

2. Poster Plus Incident.

On, saw a staff member about to use school equipment to run off a large poster with the words The poster paper was school material. The staff member said that Grievant had asked the staff member to run off the poster for her granddaughter's birthday party.

Grievant had taken the poster materials from the storage area using her keys to unlock the door and given them to the staff member.

..... orally reprimanded the staff member and took and returned the materials to the storage area.

At the hearing Grievant admitted getting the materials and asking the staff member to print the poster. Her excuse was that no one told her she could not use school property for her private use.

3. Picnic tables, cafeteria tables and lattice panels.

On Saturday,, noticed 2 picnic tables and benches, 4 cafeteria tables and 6 lattice panels were missing. On Monday,, noticed that all missing items had been returned to the campus.

Later on and at the arbitration hearing, Grievant admitted that she took the items. Her excuse was that no one told her not to take the items and that others had "borrowed" the lattice panels before.

4. Incident.

Grievant's responsibilities, as acting Head Custodian, included the daily scheduling of classroom cleaners. On, while Grievant was on vacation leave, a staff member asked if she was going to substitute as a classroom cleaner that day. replied that she had not been asked to work. The staff member then asked about the need for a classroom cleaner if was not scheduled to work. said she was going to check with Grievant first. Grievant told that she had talked with and assigned to do classroom cleaning that day. Upon her return to the cafeteria, saw that was talking on the phone. Upon inquiry said that she

was talking with Grievant. confirmed to that Grievant has not told about the work assignment earlier. added that Grievant asked to lie to

At the arbitration hearing Grievant testified that she talked to before she talked to Hence according to Grievant's testimony, she told about the assignment before she talked to

For the three incidents in which removal of school property was involved, Grievant argued that such practice had gone on for years and no one told her she could not do it. Grievant argued that she was not told by her then acting head custodian,, that school property should not be removed from the school. Further Grievant argued that she did not receive the Faculty Handbook in the fall of 1997 when the prohibition against removal of school property for personal use had been included by

On the other hand, two witnesses, and, affirmatively stated facts which indicated that Grievant was told about the prohibition against removal of school property for personal use and also that Grievant did receive the Faculty Handbook even though she did not sign a receipt. These two witnesses were credible and did not have any stake in the proceedings except a search for the truth. Hence the Arbitrator decides to rely upon the testimony of these witnesses. Also, Grievant would have no need to lie about the weed whacker being loaned for personal use unless she knew that school policy prohibited lending school property for personal use.

Similarly in the incident the testimony of the Grievant is almost opposite of testimony. Grievant said she told about the classroom

cleaning assignment and later confirmed this to says Grievant told her that Grievant had told about the assignment but was told that Grievant had not and later confirmed with that in fact Grievant had not talked to about the assignment. So there is substantial credible evidence that Grievant lied to Finally, the evidence that came to work unprepared for classroom cleaning and had to go home to change confirms testimony that Grievant had not made any prior arrangement with and lied about having done so. After carefully reviewing the testimony and evidence, the Arbitrator finds just and proper cause for disciplinary action in the three incidents involving removal of school property.

Grievant admitted that she lied to about the weed whacker incident. Whatever reasons she had to explain the lie does not justify the lie. Clearly Grievant should be disciplined for this incident.

B. Is the official letter of reprimand an appropriate disciplinary action?

The Union argues that the Employer should follow the principles of progressive discipline and issue an oral caution. Grievant had no prior disciplinary action against her.

The Employer's Progressive Discipline Policy states as follows:

Progressive discipline is the application of increasingly severe remedies and penalties if an offense is repeated. However, if an offense or violation is a serious one, progressive discipline may be waived and the employee suspended or discharged.

Under normal circumstances, the sequence followed in the application of the progressive discipline principle is:

1. Oral caution
2. Oral warning/reprimand

3. Written reprimand
4. Suspension without pay
5. Discharge

First it is noted that the Employer's Progressive Discipline Policy applies where an offense is repeated. However, if a serious violation is involved, then the progressive discipline may be waived. Here the facts involve two instances of lying and two instances of misuse of school property. Since two offenses are repeated, moving down the ladder of the Progressive Discipline Policy steps of disciplinary action to Written Reprimand is reasonable and appropriate. Indeed, the cumulative weight and seriousness of the violations permit the Employer to waive the Progressive Discipline Policy.

The Arbitrator concludes that the letter of reprimand was an appropriate remedy.

C. Can the Employer remove Grievant from the position of Acting Head Custodian?

The Grievant was the Acting Head Custodian since about The letter of reprimand also removed Grievant as Acting Head Custodian as of The letter also stated that "[y]ou will be given an opportunity to improve your conduct of integrity, honesty and trust. Failure to do so may result in more severe disciplinary action, including discharge."

The Union argues that:

1. removing Grievant from the temporary assignment was a disciplinary act.

Grievant suffered a drop in pay of 57 cents per hour as a consequence.

2. The Employer cannot discipline an employee without adequate notice of the prohibited conduct and particularly after being lax in enforcement for years.

3. The act of removal was a change in disciplinary policy which requires the Employer to negotiate with the Union.

4. Removal of temporary assignment was arbitrary because (a) subsequent events were used to deny later temporary assignment opportunities; (b) there is no time limit when Grievant will be qualified to be temporarily assigned; and (c) it affects Grievant's ability to be promoted.

In the instant case Grievant was selected for temporary assignment to the Head Custodian's position and was performing that job until, when she was removed. Hence the issue is: Can an employee that is performing a temporary assignment be removed from such temporary assignment and if so, is such removal a disciplinary action?

Temporary assignment normally occurs when an employee in a higher position ("incumbent") is not available to perform his/her job and the Employer determines that a temporary replacement is needed. The CBA requires the Employer to select the "qualified employee on duty" from the class immediately below the incumbent's class to perform the temporary assignment. The Employer makes the selection from a list of employees that qualify by seniority for temporary assignment to the higher class position. The list is prepared annually by the Employer in consultation with the Union. The CBA also provides that after "an employee has satisfactorily performed temporary assignments and he continues to possess the capabilities of performing such assignments, he shall be presumed to be qualified for future temporary assignments to such position."

The Employer argued that Grievant did not satisfactorily perform her duties and did not possess the capabilities of performing her duties and thus is presumed not qualified for temporary assignments. By her conduct, the Employer argued, Grievant set a poor example for her subordinates, abused her supervisory role by using her keys to obtain unauthorized access and use of school property for personal use and lied to her supervisors thereby demonstrating that she is not trustworthy and reliable.

Under Section 16.04, the Employer has the authority to select from the seniority list a qualified employee on duty for temporary assignment. The Employer is not bound by seniority alone in making the selection. The Employer can make a judgment whether any employee on the list is "qualified". Qualifications include whether the employee has the requisite license if the temporary assignment requires such a license, or whether the employee has demonstrated qualities of leadership, integrity, judgment and trustworthiness. The power to select implies the power to remove. For example, if the employee on temporary assignment suffers a long-term illness or no longer has a required license, then the Employer has the power to remove such employee from temporary assignment. Similarly, as in this case, if an employee by his or her conduct (i.e., lying and disregard for established rules) had clearly demonstrated a lack of integrity, leadership, judgment and trustworthiness, then the Employer has the authority to remove such employee from his/her temporary assignment.

Removing an employee from temporary assignment concurrently when such employee is disciplined is not discipline and thus not double jeopardy. The Union's State Director,, testified that "[t]emporary assignment has nothing to do with discipline or violation of rules. "The act of removal is the result of the disciplinary action

and not in itself a disciplinary act. Removal occurs after the Employer has disciplined Grievant and as a result concluded that Grievant is no longer qualified to perform the temporary assignment. Removal will have negative economic effect in that Grievant will get a pay decrease but that is a consequence of the removal and not the purpose for the removal.

The Union also contended that once an employee is on the list, such employee cannot be removed from temporary assignment. This overstates the case. Clearly where having a license such as an electrician's license is a job requirement, then an employee who loses his/her electrician's license while on temporary assignment must be removed from such temporary assignment if the Employer determines that the possession of the license is a requirement.

The act of removal, however, does not mean that Grievant cannot later qualify for temporary assignment. At the Step 2 proceeding the Employer offered to the Union to restore Grievant to her temporary assignment position if Grievant acknowledged that her behavior was inappropriate and would not continue. However, the Union, on behalf of the Grievant, refused.

There is testimony that temporary assignment opportunities arose when Grievant was not on duty. Hence, under the CBA the Employer properly did not consider Grievant for those temporary assignments. The record is not clear whether Grievant was not considered for temporary assignment when an opportunity arose while she was "on duty." There is evidence that subsequent conduct by Grievant demonstrated to that she had not changed her attitudes and conduct. From the evidence it did not appear that conduct was arbitrary or capricious.

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AWARD

The grievance is denied. The Employer had just and proper cause to issue the written reprimand The removal of the Grievant from her temporary assignment as Head Custodian of did not contravene the provisions of the Collective Bargaining Agreement.

DATED: Honolulu, Hawaii, December 10, 1998.

TAMOTSU TANAKA, Arbitrator